

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

J. MITCH HALL and NATHAN KAY,

Plaintiffs,

v.

L-3 COMMUNICATIONS

CORPORATION, L-3

COMMUNICATIONS VERTEX

AEROSPACE, LLC and L-3

COMMUNICATIONS INTEGRATED

SYSTEMS L.P.

Defendants.

NO. 2:15-cv-00231-SAB

**ORDER REGARDING
DEFENDANTS' MOTIONS FOR
PROTECTIVE ORDERS**

Before the Court are Defendants' L-3 Communications Corp. (L-3/CC), L-3 Communications Integrated Systems LP (L-3/CIS), and L-3/Vertex Aerospace LLC (L-3/Vertex) motions for protective orders. ECF Nos. 62, 63, 64, 81. After responding and objecting to several of Plaintiffs' discovery requests, Defendants filed four separate motions for protective orders and seek fees. Defendants' motions for protective orders are discussed, in turn.

STANDARD

Federal Rule of Civil Procedure 26(b)(1) provides,

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the

1 needs of the case, considering the importance of the issues at stake in
2 the action, the amount in controversy, the parties' relative access to
3 relevant information, the parties' resources, the importance of the
4 discovery in resolving the issues, and whether the burden or expense
5 of the proposed discovery outweighs its likely benefit. Information
within this scope of discovery need not be admissible in evidence to
be discoverable.

6 When a party moves for a protective order, the court "may, for good cause,
7 issue an order to protect a party or person from annoyance, embarrassment,
8 oppression, or undue burden or expense." FED. R. CIV. P. 26(c)(1). If the
9 court finds that a protective order is appropriate, it may forbid the
10 disclosure, specify the terms for discovery, or limit the scope of discovery.
11 FED. R. CIV. P. 26(c)(1).

12 "The burden is on the party seeking the order to 'show good cause' by
13 demonstrating harm or prejudice that will result from the discovery."
14 *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004). If the court
15 finds that "particularized harm will result from disclosure of information to
16 the public, then it balances the public and private interests to decide whether
17 a protective order is necessary." *Phillips ex re. Estates of Byrd v. General*
18 *Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002).

19 ANALYSIS

20 This lawsuit involves allegations of employment discrimination and
21 violations of federal and state law. Accordingly, the critical issues are whether
22 discrimination, retaliation, or violation of reemployment rights occurred. Many of
23 the discovery requests at issue appear to the Court to be overbroad, not relevant to
24 the critical issues, and not proportional to the needs of the case.

25 //

26 //

27 //

I. L-3/CC's Motion for Protective Order (ECF No. 62)

L-3/CC has moved for summary judgment claiming that Plaintiffs have no evidence supporting the imposition of liability on L-3/CC. ECF No. 61. Specifically, L-3/CC contends that Plaintiffs cannot demonstrate that L-3/CC is directly liable to Plaintiffs nor that the corporate veil should be pierced. ECF No. 61. L-3/CC is requesting a stay of discovery as to it, pending resolution of its motion for summary judgment. ECF No. 62.

A stay of discovery is improper at this juncture. However, many of the discovery requests directed to L-3/CC are overbroad, of dubious relevance, and not proportional. Additionally, it is undisputed that Plaintiffs never applied for employment with L-3/CC directly. Nonetheless, Plaintiffs' requested discovery regarding the issue of whether L-3/CC is a joint employer are relevant to Plaintiffs' claims of discrimination and L-3/CC's potential liability under Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301–4333 (USERRA). Accordingly, to the extent that Plaintiffs seek discovery on the issue of whether L-3/CC is a joint employer for the purposes of USERRA liability, L-3/CC's motion for protective order is **DENIED**. In all other respects, the Court will treat L-3/CC the same as it treats L-3/CIS and L-3/Vertex insofar as its ruling on the following motions for protective orders.

II. L-3/CIS & L-3/Vertex's Motion for Protective Order and Fees on Classified Issues (ECF No. 63)

L-3/CIS and L-3/Vertex seek to prevent discovery regarding Interrogatory No. 8 and Requests for Production (RFP) Nos. 15 and 18 which request copies of federal contracts held by L-3 entities. Defendants state that complying with this request requires them to disclose over 7,000 government contracts, many of which are confidential and subject to DD Form 254's provisions requiring governmental pre-approval before information is released to the public.

1 As part of their USERRA claims, Plaintiffs contend that the failure to
2 adhere to a company's internal policies and procedures can be circumstantial
3 evidence of employment discrimination and pretext. *See* ECF No. 83. Therefore,
4 Plaintiffs seek access to government contracts in order to verify that they contain
5 provisions requiring Defendants to follow Executive Order 11246 §202 (requiring
6 government contracts to contain a clause providing the contractor will not
7 discriminate against employees on the basis of race, creed, color, or national
8 origin) and the Vietnam-era Veterans Readjustment Assistance Act of 1974
9 (VEVRAA), 38 U.S.C. §4212 (requiring contracting party to take affirmative
10 action to employ "qualified covered veterans"). Presumably, Plaintiffs intend to
11 show that L-3/CIS and L-3/Vertex violated Executive Order 11246 and VEVRAA,
12 which in turn demonstrates a pattern of discrimination supporting their USERRA
13 claims. However, Plaintiffs do not allege Defendants violated either of these laws,
14 indeed, neither provides a private right of action.

15 The Court questions why it matters if the contracts at issue were violated in
16 some way. This is a claim for illegal discrimination and there are no claims for
17 breach of contract. Also, Plaintiffs are not even parties to the contracts and do not
18 claim status as a third party beneficiary. Plaintiffs must prove that Defendants
19 violated the law, not that they breached a contract. Additionally, any relevance is
20 outweighed by the burdensome volume of the requests and the confidential nature
21 of the contracts at issue. Finally, documents are not discoverable during the
22 pretrial discovery phase or admissible as evidence during the trial phase simply
23 because the jury would like to know about them. Juror curiosity is not the standard
24 which this Court uses to measure relevance or discoverability. Thus, for the
25 foregoing reasons, L-3/CIS & L-3/Vertex's Motion for Protective Order and Fees
26 on Classified Issues, ECF No. 63, is **GRANTED**.

27 //

28 //

**ORDER REGARDING DEFENDANTS' MOTIONS FOR
PROTECTIVE ORDERS + 4**

III. L-3/CIS & L-3/Vertex's Motion for Protective Order and Fees on Non-Classified Issues (ECF No. 64)

L-3/CIS and L-3/Vertex likewise filed a motion for protective order on non-classified issues. ECF No. 64. L-3/CIS and L-3/Vertex specifically object to the production of (1) the names of its pilots and applicants, Interrogatory No. 10 and RFP Nos. 1, 2, 6, and 12; (2) employment and hiring policies including employee handbooks, RFP Nos. 3 and 4; and (3) the identity of any individuals Defendants or their agents have interviewed concerning this case, Interrogatory No. 5 and RFP No. 5. Defendants contend that the discovery requests are overbroad and the information sought is confidential and privileged.

Names of Pilots and Applicants

Defendants object to discovery requests seeking the names of pilots and applicants in their employ. Defendants have redacted or withheld the names because, as they contend, (1) Plaintiffs do not need the names of all hired pilots or applicants (15,000 people) because Plaintiff Kay never had an interview and "Hall should know the names of pilots in his program already," and (2) Defendants are concerned about the safety implications of disclosing the names of pilots and applicants. ECF No. 64. Defendants are willing to provide the requested information subject to a confidentiality agreement. However, Plaintiffs refuse to entertain any such agreement. *See* ECF No. 68, Hine Decl. ¶24.

The product of pretrial discovery is presumptively public, although Federal Rule of Civil Procedure 26(c) permits a district court to override this presumption upon a showing of good cause. *San Jose Mercury News, Inc. v. U.S. Dist. Ct. - Northern Dist.*, 187 F.3d 1096, 1103 (9th Cir. 1999). However, Rule 5(d) only requires filing discovery material actually used in support of an action. Because not all discovery material need be filed, most discovery material is not readily accessible to the public. Courts may issue protective orders, however, when the moving party demonstrates that good cause exists and it bears the "burden of

1 showing specific prejudice or harm” that will result if no protective order is
2 granted. *Phillips v. G.M. Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002).

3 The names of pilots and applicants are discoverable and relevant to this
4 case. However, the Court is concerned with safety issues associated with the
5 disclosure of this information. Accordingly, the names of pilots and applicants are
6 discoverable, subject to reasonableness by years and confidentiality for safety
7 issues. The Court is open to suggestions on these topics but will allow the parties
8 the opportunity to reach an agreement.

9 *Employee Handbook*

10 Defendants also object to discovery of employment and hiring policies and
11 employee handbooks on the grounds that they contain proprietary information.
12 Again, Defendants are willing to provide the requested documents subject to a
13 confidentiality agreement. *See* ECF No. 64. Employment and hiring policies and
14 employee handbooks are discoverable and may be circumstantial evidence of
15 discrimination or pretext. *Lyons v. England*, 307 F.3d 1092, 1113 (9th Cir. 2002).
16 Thus, insofar as Defendants’ motion for protective order seeks to prevent
17 discovery of employment and hiring policies and employee handbooks,
18 Defendants’ motion is **denied**.

19 *Persons Interviewed*

20 Defendants also object to providing information regarding which witnesses
21 have been interviewed and information regarding those interviews on the ground
22 that the information sought is privileged. Specifically, Defendants object to
23 Interrogatory No. 5 and RFP No. 5, which seek the identity of any individuals that
24 “Defendant or its agents have interviewed concerning this case,” and “all
25 documents reflecting or relating to any interview.”

26 Pursuant to Rule 26(b)(3)(A), “a party may not discover documents and
27 tangible things that are prepared in anticipation of litigation or for trial by or for
28 another party or its representative,” but those materials may be discoverable if,

1 “the party shows that it has substantial need for the materials to prepare its case
2 and cannot, without undue hardship, obtain their substantial equivalent by other
3 means.” Work product is reflected in “interviews, statements, memoranda,
4 correspondence, briefs, mental impressions, personal beliefs, and countless other
5 tangible and intangible ways.” *Hickman v. Taylor*, 329 U.S. 496, 511 (1947).

6 Federal courts of appeals have routinely held that documents and testimony
7 pertaining to interviews by defendant’s counsel with defendant’s employees are
8 protected opinion work product. *See Baker v. General Motors Corp.*, 209 F.3d
9 1051, 1054 (8th Cir. 2000); *In re Appeal of Hughes*, 633 F.2d 282, 290 (3d Cir.
10 1980). Courts have also held that requiring a party to divulge which witnesses it
11 has interviewed violates the work product privilege as it provides insight into
12 which witnesses that party believes are critical to its case. *O’Connor v. Boeing N.*
13 *Am., Inc.*, 216 F.R.D. 640, 643 (C.D. Cal. 2003) (citing *Laxalt v. McClatchy*, 116
14 F.R.D. 438, 443 (D. Nev. 1987)).

15 Plaintiffs’ requests seek classic work product. Accordingly, insofar as
16 Plaintiffs seek the name of persons interviewed and documents pertaining to such
17 interviews, Defendants’ motion for protective order is **granted**.

18 **IV. Defendant’s Motion for Protective Order on Plaintiffs’ Second Set of**
19 **Discovery and Requests for Admission (ECF No. 81)**

20 Defendants’ joint motion for protective order on Plaintiffs’ second set of
21 discovery, ECF No. 81, primarily addresses arguments made by Defendants in
22 previous motions, thus, the above analysis applies. However, in response to
23 Plaintiffs’ second set of discovery requests, Defendants raise two additional
24 objections not at issue in prior motions. Specifically, Defendants object to
25 Plaintiffs’ request for (1) information relating to S4, JM, and MARSS Programs’
26 pilot manning roster for the calendar years 2014-2015, including the number of
27 pilot positions in each program, the names of pilots who filled those positions, the
28 dates in which those pilot positions were filled, and documents setting out optimal

1 pilot manning level for each program, and (2) documents describing the purpose,
2 function, and operational requirements of the S4, JM, and MARSS Programs.

3 *Names of Pilots and Applicants*

4 Plaintiffs request the names of pilots and applicants in the S4, JM, and
5 MARSS programs with an even broader temporal scope of ten years. As discussed,
6 the request for ten years' worth of information is overbroad. Accordingly, insofar
7 as Plaintiffs request names of pilots and applicants dating back ten years,
8 Defendants' motion is **granted**. Moreover, the Court is not in the business of
9 drafting discovery requests and rejects the request from Plaintiffs to redraft the
10 offending discovery requests.

11 *Pilot Manning Roster*

12 Defendants also object to production of the S4, JM, and MARSS pilot
13 manning roster for the calendar years 2014-2015. The pilot manning roster is the
14 document that sets out the number of pilot positions in each program, the names of
15 pilots who filled those positions, the dates those positions were filled, and
16 documents that set out the optimal pilot manning level for each program.
17 Defendants state that they will produce this information, subject to a
18 confidentiality agreement. *See* ECF No. 81.

19 The Court agrees that this information should be provided only with a
20 confidentiality agreement due to the safety concerns raised by Defendants.
21 Defendants should draft a proposed confidentiality agreement regarding the
22 disclosure of the pilot manning roster, which the Court will review only if
23 necessary and if Plaintiffs refuse to accept.

24 *Purpose, Function, and Operational Requirements of*
25 *S4, JM, and MARSS Programs*

26 Defendants further object to RFP No. 20, which asks Defendants to produce
27 documents that describe the purpose, function, and operational requirements of the
28 S4, JM, and MARSS Programs. Defendants contend this overly broad discovery

1 request seeks wholly irrelevant information. The Court agrees. Plaintiffs requests
2 are overbroad and burdensome with little or no relevance. Accordingly, insofar as
3 Plaintiffs seek information regarding the purpose, function, and operational
4 requirements of the S4, JM, and MARSS Programs, Defendants' motion is
5 **granted.**

6 **V. Sanctions and Fees**

7 Both Plaintiffs and Defendants contend that they are entitled to fees arising
8 out of this discovery dispute. Defendants likewise seek fees under the Court's
9 inherent authority to sanction Plaintiffs' counsel Thomas Jarrard.

10 Rule 37(a)(5) governs the award of expenses, including attorneys' fees, in
11 the event a motion for a protective order is granted, denied, or granted in part and
12 denied in part. If the Court grants the motion, it must require the party whose
13 conduct necessitated the motion to pay the movant's reasonable expenses incurred
14 in making the motion, including attorneys' fees. However, the Court must not
15 order an award of expenses and fees if it finds that (1) the movant did not attempt
16 in good faith to obtain disclosure of discovery prior to filing its motion with the
17 court, (2) the opposing party's response was substantially justified, or (3) "other
18 circumstances make an award of expenses unjust." *See* FED. R. CIV. P.

19 37(a)(5)(A). If the movant's motion for protective order is denied, the Court must
20 require the movant to pay the party opposing the motion's reasonable expenses
21 and attorneys' fees. However, the Court must not order this payment if the motion
22 was "substantially justified or other circumstances make an award of expenses
23 unjust." *See* FED. R. CIV. P. 37(a)(5)(B). If the motion is granted in part and
24 denied in part, the Court may issue a protective order and may, after giving the
25 parties an opportunity to be heard, "apportion the reasonable expenses for the
26 motion." FED. R. CIV. P. 37(a)(5)(C).

27 After careful consideration, the Court declines to award fees to either party.
28 The Court finds that the parties had good faith disputes regarding the extent of

1 discovery and the relevance of the materials at issue. However, it is apparent that
2 some of the lawyers have not acted with the degree of respect and professionalism
3 expected by this Court. The behavior of Mr. Jarrard is of particular concern.
4 Disagreements regarding issues are to be expected, and is a normal part of the
5 advocacy process. Being disagreeable while discussing those disputes is not
6 acceptable, and is not a normal part of the advocacy process. Future behavior of
7 the type described will not be tolerated by this Court, and will result in sanctions.

8 The Court encourages the lawyers to carefully review Local Rule 83.1
9 (Civility) and Washington Rule of Professional Conduct 3.4 (Fairness to Opposing
10 Party and Counsel). At a minimum, these rules require the following:

11 (1) Each lawyer has the responsibility for making our system of justice work
12 honorably, fairly, and efficiently.

13 (2) Civility and courtesy are not to be equated with weakness.

14 (3) Lawyers will act with dignity, integrity, and courtesy in oral and written
15 communications.

16 (4) Lawyers will agree with reasonable requests for extensions of time,
17 stipulate to undisputed facts to avoid needless costs or inconvenience, and
18 waive procedural formalities when the interests of the client will not be
19 adversely affected.

20 (5) Lawyers will facilitate the processing of all reasonable discovery
21 requests.

22 (6) Lawyers will not ask colleagues for the rescheduling of court settings or
23 discovery proceedings unless a legitimate need exists; nor will lawyers
24 unreasonably withhold consent for scheduling accommodations. Lawyers
25 will try to consult with opposing counsel before scheduling depositions,
26 hearings and other proceedings or meetings.

27 (7) Lawyers will promptly respond to oral and written communications.

28 (8) Lawyers will avoid condemning their adversary or the opposing party.

1 Accordingly, **IT IS HEREBY ORDERED:**

- 2 1. Defendant L-3/CC's Motion for Protective Order, ECF No. 62, is
- 3 **DENIED** to the extent that Plaintiffs seek discovery regarding whether
- 4 L-3/CC is a joint employer for the purpose of USERRA liability.
- 5 2. L-3/CIS & L-3/Vertex's Motion for Protective Order and Fees on
- 6 Classified Issues, ECF No. 63, is **GRANTED**.
- 7 3. L-3/CIS & L-3/Vertex's Motion for Protective Order and Fees on Non-
- 8 Classified Issues, ECF No. 64, is **GRANTED, in part, and DENIED, in**
- 9 **part**. The names of pilots and applicants is discoverable subject to
- 10 reasonableness by years and confidentiality for safety issues; the Court is
- 11 open to suggestions but will allow the parties to reach an agreement. To
- 12 the extent that Plaintiffs seek employment policies and employee
- 13 handbooks, Defendants' motion is denied; such information is
- 14 discoverable. To the extent that Plaintiffs seek the names of persons
- 15 interviewed and related documents, Defendants' motion is granted, such
- 16 information is not discoverable.
- 17 4. Defendant's Motion for Protective Order on Plaintiffs' Second Set of
- 18 Discovery and Requests for Admission, ECF No. 81, is **GRANTED, in**
- 19 **part, and DENIED, in part**. Insofar as Plaintiffs seek the names of
- 20 pilots and applicants dating back ten years, Defendants' motion is
- 21 granted; the request is overbroad. The pilot manning roster is
- 22 discoverable subject to a confidentiality agreement which Defendants
- 23 will draft and the Court will review, only if necessary. To the extent that
- 24 Plaintiffs request information regarding the purpose, function, and
- 25 operational requirements of the S4, JM, and MARSS Programs,
- 26 Defendants' motion is granted.

27 //

28 //

1 5. Plaintiffs request for fees is **DENIED**.

2 6. Defendants request for fees and/or sanctions is **DENIED**.

3 **IT IS SO ORDERED.** The District Court Executive is hereby directed to file this
4 Order and provide copies to counsel.

5 **DATED** this 18th day of January 2017.



10 

11 Stanley A. Bastian
12 United States District Judge
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28